

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Susan James, :
 :
 : Petitioner :
 :
 : v. : No. 202 C.D. 2010
 :
 : Unemployment Compensation : Submitted: August 20, 2010
 : Board of Review, :
 : Respondent :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: October 19, 2010

Susan James (Claimant) petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the order of the referee and denied benefits. We affirm.

Claimant worked for Reading Hospital and Medical Center (Employer) as an RN, staff nurse, from 1976 until her last day of work on May 30, 2009. Claimant filed an application for unemployment compensation benefits. The Allentown UC Service Center (Service Center) issued a Notice of Determination denying Claimant's application on the basis that Claimant was ineligible for benefits

under Section 402(b) of the Unemployment Compensation Law¹ (Law) because Claimant voluntarily left work without cause of a necessitous and compelling nature.

Claimant timely appealed the Service Center's notice to the referee. A hearing was held on August 3, 2009. The referee found that Claimant failed to sustain her burden of providing cause of a necessitous and compelling nature to voluntarily leave her employment. The referee concluded that Claimant was ineligible for benefits pursuant to Sections 402(b) of the Law. By decision dated August 4, 2009, the referee affirmed the decision of the Service Center and denied benefits.

From this decision, Claimant filed an appeal with the Board. The Board adopted the findings of the referee, which are as follows. In April 2009, Claimant became aware that Employer was engaged in cost cutting measures and sought to downsize its workforce. On or about April 11, 2009, Claimant became aware of the existence of a voluntary incentive package offered to employees which provided for a one time severance payment, as well as additional weeks of salary for every year of service with Employer and continuance of health benefit coverage for six months to those who accepted separation under the incentive package. Claimant had concerns over the security of her position in the event she did not choose to accept the voluntary separation package. Claimant accepted the incentive package on

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(b). This section provides:

An employe shall be ineligible for compensation for any week --

(b) In which his unemployment is due to voluntarily leaving work *without cause of a necessitous and compelling nature* irrespective of whether or not such work is in "employment" as defined in this Act

43 P.S. §802(b) (emphasis added).

April 17, 2009 and her last day with Employer was May 30, 2009. Claimant was never specifically informed that her position or employment in her department would be terminated had she not accepted the voluntary separation package.

The Board additionally found that Claimant testified that she was homebound and not able to get to work. As a result, she rebutted her presumption of availability. The Board ultimately concluded that Claimant is ineligible for benefits pursuant to Sections 402(b) and 401(d)(1)² of the Law. By decision dated October 22, 2009, the Board affirmed the referee's decision as modified and denied benefits to Claimant. Claimant filed a request for reconsideration, which the Board granted. By decision dated January 14, 2010, the Board concluded that its previous decision denying benefits was correct. Claimant then filed the instant appeal.³

Claimant raises the following issues for our review:

1. Whether Claimant is entitled to unemployment compensation benefits since she voluntarily quit her position as a registered nurse for a cause both necessitous and compelling when factors pointed to a likelihood of imminent discharge at the time of her quit and post-quit documentary evidence created by Employer exists to substantiate the quit.

² This section provides:

Compensation shall be payable to any employe who is or becomes unemployed, and who—

* * *

(d)(1) Is able to work and available for suitable work:

43 P.S. §801(d)(1).

³ This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

2. Whether Claimant's inability to work following a knee surgery on July 23, 2009 affects her right to unemployment compensation benefits both prior to that date and after a return to her availability to work.

First, Claimant contends that she voluntarily quit her position as a registered nurse for a cause both necessitous and compelling because the evidence pointed to a likelihood of imminent discharge at the time of her quit and post-quit documentary evidence created by Employer exists to substantiate the quit. We disagree.

Section 402(b) of the Law provides that an employee who voluntarily terminates her employment without cause of a necessitous and compelling nature is ineligible for benefits. Whether or not one has "cause of a necessitous and compelling nature" to quit employment so as to be entitled to collect unemployment compensation benefits is a question of law subject to review by this Court. Chamoun v. Unemployment Compensation Board of Review, 542 A.2d 207 (Pa. Cmwlth. 1988). A claimant seeking to collect unemployment compensation bears the burden of proving that a voluntary termination of employment was for cause of a necessitous and compelling nature. Mutual Pharmaceutical Company, Inc. v. Unemployment Compensation Board of Review, 654 A.2d 37 (Pa. Cmwlth. 1994); Steinberg Vision Associates v. Unemployment Compensation Board of Review, 624 A.2d 237 (Pa. Cmwlth. 1993). A cause of a necessitous and compelling nature is one that results from circumstances which produce pressure to terminate employment which is both real and substantial and which would compel a reasonable person under the circumstances to act in the same manner. Monaco v. Unemployment Compensation Board of Review, 523 Pa. 41, 565 A.2d 127 (1989).

In establishing that a voluntary quit was reasonable, a claimant "must establish that he acted with ordinary common sense in quitting his job, that he

made a reasonable effort to preserve his employment, and that he had no other real choice than to leave his employment." PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 58, 61 (Pa. Cmwlth. 1996) (quoting Stroh-Tillman v. Unemployment Compensation Board of Review, 647 A.2d 660, 662 (Pa. Cmwlth. 1994)). If a claimant does not take all "necessary and reasonable steps to preserve the employment relationship, he or she has failed to meet the burden of demonstrating necessitous and compelling cause." PECO, 682 A.2d at 61.

"In the context of corporate downsizing, the critical inquiry is whether the fact-finder determined the circumstances surrounding a claimant's voluntary quit indicated a likelihood that fears about the employee's employment would materialize, that serious impending threats to her job would be realized, and that her belief her job is imminently threatened is well-founded." Renda v. Unemployment Compensation Board of Review, 837 A.2d 685, 692 (Pa. Cmwlth. 2003), petition for allowance of appeal denied, 581 Pa. 686, 863 A.2d 1151 (2004); see Mansberger v. Unemployment Compensation Board of Review, 785 A.2d 126 (Pa. Cmwlth. 2001); PECO Energy Company v. Unemployment Compensation Board of Review, 682 A.2d 49 (Pa. Cmwlth. 1996), petition for allowance of appeal denied, 547 Pa. 739, 690 A.2d 238 (1997); Staub v. Unemployment Compensation Board of Review, 673 A.2d 434 (Pa. Cmwlth. 1996).⁴

"[S]peculation pertaining to an employer's financial condition and future layoffs,

⁴ See also Diehl, Jr. v. Unemployment Compensation Board of Review, __ A.3d __ (Pa. Cmwlth., No. 2421 C.D. 2009, filed September 20, 2010), wherein this Court, in an *en banc* decision, declined to overrule Renda and reverse the long standing holding of this Court that Section 402(b) of the Law does not apply where a claimant accepts an early retirement incentive package.

however disconcerting, does not establish the requisite necessitous and compelling cause.” Renda, 837 A.2d at 692 (quoting Staub, 673 A.2d at 437). “[W]here at the time of retirement suitable continuing work is available, the employer states that a layoff is possible but not likely, and no other factors are found ... that remove an employee's beliefs from the realm of speculation, a claim for unemployment benefits fails despite the offer to leave.” Id.

In support of her position, Claimant relies upon Eby v. Unemployment Compensation Board of Review, 629 A.2d 176 (Pa. Cmwlth. 1993). In Eby, the employer informed claimant that he was in a group of employees identified for elimination and continuing work was not available. The claimant testified that he believed he would be terminated if he did not accept the separation incentive offered by the employer. On these bases, we concluded that the claimant reasonably believed that he would be terminated if he did not accept his employer's separation package and, therefore, his voluntary termination was for a necessitous and compelling reason.

This case, however, is distinguishable. Unlike the claimant in Eby, Claimant was never specifically told that her position was in jeopardy and that continuing work was not available. Claimant testified that Employer offered the incentive package to persuade employees to voluntarily leave and that based upon the number voluntarily leaving, Employer would then determine how many employees it would involuntarily lay off. Reproduced Record (R.R.) at 27. Despite post-termination evidence indicating that her position would have been eliminated had Claimant not accepted the incentive package (R.R. at 10), at the time Claimant accepted the incentive package, Claimant’s assumption that she would be laid-off was merely speculative. Such speculation, without more, does not constitute a necessitous and compelling reason to voluntarily terminate her

position. Renda. We, therefore, conclude that the Board properly determined that Claimant failed to establish the requisite necessitous and compelling cause to voluntarily terminate her employment. Thus, the Board properly denied benefits pursuant to Section 402(b) of the Law.⁵

Accordingly, the order of the Board is affirmed.

JAMES R. KELLEY, Senior Judge

⁵ In light of this disposition, we need not address the remaining issue raised by Claimant.

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ORDER

AND NOW, this 19th day of October, 2010, the order of the Unemployment Compensation Board of Review, dated January 14, 2010, at Decision No. B-490385-A is AFFIRMED.

JAMES R. KELLEY, Senior Judge